INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT	4
The Publications	4
The Covenants Controversy	11
Instructions on Actual Malice	14
SUMMARY OF ARGUMENT	17
ARGUMENT – Introduction	19
I. Knowing Falsity or Recklessness Cannot Be Established by Extracting a Word Out of Context and Ascribing to It a Meaning Wholly Foreign to the Article in Which It Appears	21
II. Clear Expressions of Opinion Regarding an Accurately Described Public Proposal Should Not Be Actionable	25
III. Failure to Verify Information Obtained from a Number of Apparently Reliable Sources Does Not Constitute Reckless Disregard of the Truth	28
IV. This Court Should Hold That There Is Insufficient Evidence as a Matter of Law To Permit Recovery Under The *New York Times* Rule	31
V. The Trial Court Erred in Its Instructions:	
(A) By repeatedly instructing that recovery could be based upon "actual malice" which was defined as "spite, hostility or deliberate intention to harm" that could be inferred from the publications themselves	34
(B) By refusing to instruct on the meaning of reckless disregard of the truth	37
CONCLUSION	37
APPENDIX A – Excerpts from Newspaper Articles	A-1

CITATIONS

CASES:

Afro-American Publishing Co. v. Jaffee, 366 F.2d 649 (D.C. Cir. 1966) 22n

Associated Press v. Walker, 388 U.S. 130 (1967), *sub nom. Curtis Publishing Co. v. Butts* 20n

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) . . . 25, 28, 32, 33, 35

Bennett v. Seimiller, 175 Kan. 764, 267 P.2d 926 (1954) 23

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 19, 25, 30n, 32

Flanagan v. Nicholson Publishing Co., 137 La. 588, 68 So. 964 (1915) 23

Garrison v. Louisiana, 379 U.S. 64 (1964) 25, 28, 30-31, 33, 37

Henry v. Collins, 380 U.S. 356 (1965) 25, 35

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 2, 15n, 17-18, 20, 24, 25, 28, 31, 32, 34

Parker v. Kirkland, 298 Ill. App. 340, 18 N.E.2d 709 (1939) . . . 23

Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967) 33-34

Pickering v. Board of Education, 391 U.S. 563 (1968) 32

Pulvermann v. A. S. Abell Co., 131 F.Supp. 617 (D. Maryland 1955), *aff'd*, 228 F.2d 797 (4th Cir. 1956) 27-28

Rosenblatt v. Baer, 383 U.S. 75 (1966) 15, 34

St. Amant v. Thompson, 390 U.S. 727 (1968) 28-29, 32

Time, Inc. v. Hill, 385 U.S. 374 (1967) 24n, 36

Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 32

CONSTITUTION AND STATUTES:

United States Constitution, First Amendment 3

United States Constitution, Fourteenth Amendment, § 1 3

28 U.S.C., Section 1257(3) 2

MISCELLANEOUS AUTHORITIES:

American Jurisprudence, *Libel and Slander*, Vol. 33, § 87 23
Prosser, *The Law of Torts*, 3rd Ed., 1964, p. 814 ..... 27n
Restatement of Torts, 1938, § 606, Comment *b* 27n

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 413

GREENBELT COOPERATIVE PUBLISHING ASSOCIATION, INC., and ALFRED M. SKOLNIK,

Petitioners

v.

CHARLES S. BRESLER,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR PETITIONERS

OPINION BELOW

The trial court (Circuit Court of Prince George's County) did not write an opinion. Its instructions to the jury are printed in full in the Appendix at E. 188, and its entry of judgment is printed at E. 15. The opinion of the Court of Appeals of the State of Maryland, printed at E. 265, is reported in 253 Md. 324, 252 A.2d 755.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on May 2, 1969 (E. 265). In the trial court, petitioners objected on First Amendment grounds to the sufficiency of the evidence as a matter of law in motions for a directed verdict and for judgment N.O.V. (E. 9-15, 116-9, 186-7) and to the instructions complained of in this Court (E. 8-9, 199-210). These objections were renewed in the Court of Appeals and are discussed in its opinion at E. 300-4 and E. 313-9, respectively. The petition for writ of certiorari was filed on July 31, 1969 and was granted on October 20, 1969, ____ U.S. ____. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The questions presented all relate to the meaning and application of the rule of constitutional protection, first announced in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), that prohibits a public official or a public figure from recovering damages for a defamatory falsehood relating to his official or public conduct unless he proves that the statement was made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

1. Whether knowing falsity or reckless disregard of the truth under the *New York Times* rule can be established by extracting a word out of context and ascribing to it a meaning wholly foreign to the article in which it appears.

2. Whether, under the *New York Times* rule, a libel judgment can be predicated on an expression of opinion regarding a public proposal requesting governmental action where the proposal to which the opinion clearly referred is accurately described in the article in issue.

3. Whether the failure to further verify information obtained from a number of apparently reliable sources con-

stitutes sufficient evidence of reckless disregard of the truth under the *New York Times* standard.

4. Whether there is sufficient evidence as a matter of law to establish knowing falsity or reckless disregard of the truth.

5. Whether, in a libel case to which the *New York Times* rule applies, the trial court erred:

(a) By instructing the jury that "actual malice" which would permit recovery consists of "a state of mind . . . best described as spite, hostility or deliberate intention to harm" that could be inferred from the language of the publications in issue; and

(b) By refusing to instruct that "[r]eckless disregard of the truth is more than mere negligence on the part of the newspaper . . . [p]laintiff must show by a preponderance of the evidence that the defendants published defamatory false statements with a high degree of awareness of their probable falsity."

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This action for alleged libel stems from a heated controversy over zoning and land development in the City of Greenbelt, Maryland. Petitioners are publishers of the Greenbelt News Review, a weekly newspaper staffed on a part-time basis by interested residents. Respondent Bresler is a major builder-developer in Greenbelt who had had numerous dealings with the Greenbelt City Council seeking approval for higher density zoning for various tracts of land. During the period involved, Bresler was also a member of the Maryland House of Delegates and later a candidate for Comptroller of the State.

The declaration challenged several articles in the News Review which contained criticism of Bresler's dealings with the City Council and with other governmental agencies regarding zoning requests and land development matters. Respondent's counsel conceded in his opening statement that Bresler was a public figure in Greenbelt and it was assumed throughout the trial that the *New York Times* rule was applicable to the articles in issue. This same assumption is accepted, albeit reluctantly, by the Court of Appeals (E. 296-7).[1]

The Publications

Bresler relied principally on two articles which accurately report public debate at two City Council meetings convened to consider a zoning proposal made by him to the Council. The pertinent parts of the first article, dated October 14, 1965, are as follows:

> SCHOOL SITE STIRS UP COUNCIL
> REZONING DEAL OFFER DEBATED
>
> By Dorothy Sucher
>
> Delay in construction of a new Greenbelt high school is the lever by which a local developer is pressuring the city to endorse his bid for higher

[1] This assumption is clearly correct for the reasons stated *infra*, pp. 19-20.

density rezoning of two large tracts of land; so citizens heard at a well-attended special meeting of the City Council on Monday night, Oct. 11.

For the past nine months, the Board of Education has been trying to acquire land owned by Consolidated Syndicates, Inc. (Charles Bresler-Theodore Lerner), for a high school site.

* * *

Some time ago, it became known that the developer would agree on the price, provided the city would help him obtain higher density rezoning for two of his tracts (Parcels 1 and 2, totaling 230 acres) near the center of Greenbelt. If the city refused, he threatened to delay the school site acquisition as long as possible through the courts.

* * *

Blackmail

"It seems that this is a slight case of blackmail," commented Mrs. Marjorie Bergemann on Monday night, and the word was echoed by many speakers from the audience.

Councilman David Champion, however, denied that it was "blackmail," explaining that he would rather "refer to it (i.e., the negotiations–Ed.) as a two-way street."

Speaking from the floor, Gerald Gough, commented: "Everyone knows there's a need for a school–just walk through the halls of High Point. The developer knows there's a need and says, 'we'll meet your need if you meet our need.' In my opinion, it's highly unethical."

* * *

Among the parents who spoke was Mrs. Joseph Rosetti, who said: "I have several children going into high school, but I would rather adhere to the Greenbelt Master Plan than overcrowd the town with dense development. I would stand for my children's discomfort, rather than give in to a blackmailing scheme." (Pl. Ex. 1, E. 211-2, Tr. 39)

The pertinent parts of the second article, dated October 21, 1965, are as follows:

COUNCIL REJECTS BY 4-1
HIGH SCHOOL SITE DEAL

By Mary Lou Williamson

More than 150 citizens came to hear how the new City Council would respond to pressure by a local developer for a higher density zoning on a large tract of land in exchange for uncontested consummation of the sale of a Greenbelt senior high school site to the Board of Education at the Council meeting Monday night.

Council sat quietly listening for more than an hour to citizen statements before voting to reject the proposal (4-1) with Councilman Dave Champion dissenting.

* * *

A procession of citizens took the floor to make impassioned speeches—some from prepared texts, some extemporaneously. The mayor occasionally had to caution them to refrain from engaging in personalities.

Albert Herling suggested skulduggery in the September court postponement. Although he praised most of the City Manager's report, he criticized the section entitled "Risks and Conclusions," saying they appeared negative in the extreme. He suggested a list of positive steps that council ought to take: 1) fight Bresler's "blackmail"; 2) make clear to the Board of Education—no deals; 3) make clear to the District Council (zoning authority) unanimous opposition to the requested R-30 zoning; and 4) seek the swiftest possible court settlement.

* * *

Pilski asked if anyone in the audience cared to speak in support of Bresler's proposal.

Only James Martin took the floor. He suggested that Bresler's action was not "blackmail" but the

> legitimate advance of his rights to develop his land. Martin suggested, by the way of example, that GHI's long-range planning committee had been doing much the same thing some months ago. He alleged that the density of the "frame homes (GHI) is far more atrocious than anything Bresler's considering." (Pl. Ex. 2, E. 216-9, Tr. 39)

The opinion of the Court of Appeals rests squarely on the incredible proposition that these articles charge Bresler with the crime of blackmail.[2] Thus, the court's central and critical finding is that "[t]he charging of Mr. Bresler with having committed blackmail could be found by the jury (as it was) that he was charged with the commission of a crime." (E. 291)[3]

With this interpretation of the articles as its premise, the court further finds "convincing evidence" sufficient to overcome the constitutional protection of the *New York Times* rule based solely on the following "admissions" by petitioners' witnesses:

1. the word blackmail taken out of context could charge the commission of a crime, and
2. there was no evidence uncovered at the public meeting that Bresler committed the crime of blackmail (E. 298, 300-2).

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[2]The court also stated that the second article was not accurate because the word "skulduggery" was not a direct quote of any speaker at the meeting. The uncontradicted testimony, however, is that it was a fair and accurate condensation of Mr. Herling's remarks concerning official action taken by the School Board in postponing its condemnation action against respondent (E. 42-3, 152-3, 162-3).

[3]It is highly improbable that the jury in fact made such a finding since the trial court defined blackmail in its instruction as "the extortion of money by threats or overtures toward criminal prosecution or the destruction of a man's reputation or social standing." (E. 196) The jury is much more likely to have concluded from the clearly erroneous instructions on actual malice, see *infra*, pp. 34-6, that the term blackmail was an "excessive" or "intemperate" opinion published with "hostility" toward respondent.

Thus, the court concludes, on the basis of this testimony alone that: "It would be difficult to conceive of a case in which there was more 'convincing evidence'—the admissions of one of the appellants and of several of their witnesses—that the appellants did indeed have actual knowledge of the falsity of the charge or, in any event, entertained 'serious doubts as to its truth.'" (E. 301-2)[4]

Needless to say, Bresler was unable to identify a single person who understood the articles as charging him with the crime of blackmail nor was he able to explain how he himself arrived at that interpretation (E. 114-6). Bresler did not even complain to the News Review regarding the articles until he filed this action some nine months later when he was in the midst of his campaign for State Comptroller and the News Review had begun to accurately criti-

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[4]The testimony clearly establishes that the term "blackmail" was understood at the meetings and by the News Review staff not in the criminal sense but in the colloquial sense to mean that Bresler was attempting to coerce the City into accepting his zoning proposal by threatening to hinder the City in obtaining the school site which it desired. Thus, Mr. Skolnik who, along with the other members of the editorial board, reviewed the articles prior to their publication testified:

> We never—all I can say again is that we were viewing this as a description, a colorful description, what was going on at that time. We never looked at it as a description of criminal blackmail. (E. 33)
>
> * * *
>
> I think that the word was used to indicate a situation where the developer was using two pieces of ground as a lever to get a higher density to [sic] one piece of land in exchange for something the city needed. (E. 34)

Mrs. Sucher, the reporter who wrote the first article, testified why she did not interpret the article as charging the crime of blackmail:

> Well, the crime of blackmail—my knowledge of the crime of blackmail, I am afraid is really from mystery stories, but I think of this being extorted money by threatening to tell something you know and there was nothing like that. I mean they couldn't have meant that. (E. 165)

cize his disregard of land covenants given to the City with respect to another tract.[5]

Bresler also complained of an article dated June 9, 1966, entitled "Charles Bresler To Run For State Comptroller" which reviewed the status of his land dealings in the community (Pl. Ex. 6, E. 222-3, Tr. 40). Bresler claimed the following statement was not only false but was published recklessly:

> Reportedly, a number of homeowners, both in the Lakecrest and Boxwood developments, have started legal proceedings against Bresler for failure to make construction corrections in accordance with county standards.

The reporter, Mrs. Skolnik, was told by 15-20 homeowners who attempted to air their grievances at a public meeting that they had gone to their lawyers to start action and had filed complaints with county authorities regarding construction defects in their homes, which Mrs. Skolnik understood as starting legal proceedings. Many of the homeowners were either personally known to her or were recognized by her as responsible residents in the community. Moreover, she had previously heard similar statements from other homeowners in the respective developments. The homeowners identified Bresler as the builder against whom they were complaining (E. 172-7).

Although Bresler conceded that a number of homeowners had complained to him (E. 112), he maintained the article was false because no suits had been filed against him personally. At least one suit had been filed, and three others were subsequently filed, against the respective development corporations in which Bresler was a principal (E. 19). Bresler's claim that he was no longer active in the corporations was flatly contradicted by his own contemporaneous affidavit in an unrelated action in which he described himself as then being the Vice President in charge

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[5] See *infra*, pp. 11-13.

of sales for one of the corporations (E. 112-4; Def. Ex. 36, E. 260-1, Tr. 730).[6]

Although the trial court paid little attention to the article,[7] the Court of Appeals concluded that the jury might well have found that the "failure by Mrs. Skolnik to verify either in the court records or by a simple telephone call to Bresler the truth of the serious charge of the institution of the suits, amounted to recklessness sufficient for a finding of actual malice." (E. 303) At the same time, the Court of Appeals approved the trial court's refusal to give the following instruction requested by petitioners:

> Reckless disregard of the truth is more than mere negligence on the part of the newspaper. The plaintiff must show by a preponderance of the evidence that the defendants published defamatory false statements with a high degree of awareness of their probable falsity. (E. 8-9)

The Court of Appeals held that "the trial court was under no obligation to give a further definition of the phrase 'reckless disregard of the truth' as the phrase is sufficiently definite in itself and sufficiently presented the issue to the jury". (E. 319)

The other articles in issue were given little attention at the trial,[8] and there was no evidence that the statements complained of were factually incorrect.

Substantially all of Bresler's remaining evidence was devoted to showing that petitioners and some of the persons quoted in the articles in issue were hostile to him

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[6]Bresler didn't know whether he told the complaining homeowners, with whom he continued to deal, that he was no longer active (E. 112-3).

[7]In denying petitioners' motion for a directed verdict, the trial court stated: "The allegations in the articles on the Controller [don't] bother me too much." (E. 186)

[8]For example, the letter to the editor describing Bresler's zoning proposal as "An Unethical Trade," referred to by the Court of Appeals at E. 271-2, 294, 303, was not even mentioned at the trial.

because they had strongly opposed his land development activities on other occasions. The Court of Appeals concluded from this evidence—primarily as it related to the covenants controversy described below—that "there were sufficient facts to indicate to the jury, an affirmative hostility, a personal animus, against Bresler and a desire on the part of the publishers of the News Review to injure his reputation and standing in the Greenbelt area through the use of the false charges." (E. 303-4)

The Covenants Controversy

In 1962 Bresler executed land covenants limiting his development of a 50-acre tract in the center of town to an average density of 7 units per acre in exchange for the City's support for his zoning requests. Shortly thereafter, however, he began building at one end of the tract at a much higher density per acre. Then, in June 1964, without notifying the city, he filed in the land records a document purporting to nullify the covenants on the grounds that they had not been consented to by the holder of a deed of trust which he allowed to be placed on the property two weeks before the covenants were signed (E. 16-17).

Bresler nevertheless continued to create the impression that he considered that the covenants were still binding and that he would limit his further development of the 50 acres to an average density of 7 units per acre or a total of 350 units as promised. Thus, in May 1965, he appeared before the City Council to deny reports that he planned an additional 490 units when in fact a detailed plat seeking approval for the additional units had already been filed with the area planning agency (E. 105-6; Def. Ex. 6, E. 245, Tr. 730). Moreover, in answering questions by Councilman Bernstein he affirmatively misrepresented that he still considered the covenants to be binding as follows:

Bernstein: "How many units do you have planned at the moment?"

Bresler: "I have another 178 units that are being planned right now."

Bernstein: "That's a total of how many?"

Bresler: ". . . 298 units."

Bernstein: "What is the covenants that you put on there in so far as units . . ."

Bresler: "I'm well within it."
(Someone spoke up and said 350 units.)

Bernstein: "Our concern is when you talk of planning or you don't talk of it, you infer that there may be more than 350 units planned there."

Bresler: "If there ever are, you gentlemen will have to approve it first."[9] (E. 17-18)

Bresler also did not mention that the 178 units he admitted he was planning were to be in a single eight-story apartment house which violated not only the density but the building height restrictions of the covenants (E. 16-7, 106-7).

Bresler's purported release of the covenants did not come to light until after the City filed suit in March 1966 to enjoin construction of the apartment house (E. 137-8; Pl. Ex. 4, E. 221, Tr. 40). The suit was unsuccessful because the City was held to have waived its rights by failure to file suit on time, and Bresler ultimately developed half the 50-acre tract at twice the density limit in the covenants and sold the rest (E. 17).

In an article in issue dated April 7, 1966 the News Review published a critical but factually accurate account of Bresler's activities with respect to the covenants under the heading "Bresler Repudiates Covenants Signed With City In 1962." (Pl. Ex. 4, E. 221, Tr. 40). Other News Review articles regarding the breach of covenants (Pl. Ex. 6, E. 222-23, Tr.40; Pl. Ex. 11, E. 228-30, Tr. 173 [two articles]: Def.

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[9]The covenants were the only basis upon which City approval would be required (E. 138). When asked at the trial why he didn't tell the Council at this meeting that he had formally declared the covenants null and void eleven months earlier, Bresler replied, "I don't know that they asked me." (E. 105)

Ex. 33, E. 257, Tr. 730) were followed by a critical editorial on July 7, 1966.[10]

The Court of Appeals finds that these "attacks" on Bresler's disregard of the covenants show actual malice *because three years earlier the News Review had not attacked* (a) an agreement by the City allowing another developer to build at a higher density in another part of town (Lakeside North) and (b) the developer's alleged violation of that agreement by constructing garden apartments rather than townhouses (E. 304).[11]

The Court of Appeals also finds actual malice was shown because two members of the News Review staff supported a community fund drive by a local civic organization to help finance an unsuccessful citizens' suit against Bresler for breach of the covenants (E. 303). The fund drive was not started, however, until June 1966 which was *eight months after* publication of the articles containing the word "blackmail" and after Bresler's misrepresentations with respect to the covenants had been revealed in the interim. Moreover, the court's further finding that the limited publicity given the fund drive in the News Review contained a "misrepresentation" that the funds were

[10]Two weeks later Bresler, who was then well into his campaign for Comptroller, brought this $2 million libel action. The editorial was originally included in the suit but was withdrawn because of Bresler's unwillingness to make discovery (E. 18).

[11]The News Review did not object to the higher density because at the time Lakeside North was on the periphery of town and "no one seem[ed] to feel this was out of line with what the City wanted." (E. 37) It was not until after his release of the covenants came to light that Bresler contended, for the first time in 1966, that the City in 1962 had breached an understanding with him to "get the same covenants from everybody" when it agreed to the higher density for Lakeside North. Councilman Bernstein flatly denied there was any such understanding with Bresler or that he had been discriminated against (E. 139-144). Finally, there was no violation of the Lakeside covenant, as assumed by the Court of Appeals, since by the terms of that covenant it was superseded by new zoning which permitted garden apartments (E. 147).

to be used "*only* to enjoin" violations of the Master Plan when, in fact, the suit against Bresler was at law for injunctive relief and damages (E. 303) is completely without substance. The two articles relied upon as containing this "misrepresentation" do not mention the form of relief to be requested (Pl. Ex. 11, E. 230, Tr. 173; E. 68-9). Moreover, both articles were published well before the citizens' suit against Bresler was filed and there was no evidence that anyone on the News Review knew of the nature of the suit before it was filed.[12]

Instructions on Actual Malice

Although petitioners requested instructions limited to the constitutional standard of actual malice (E. 8-9), the trial court repeatedly instructed the jury that Bresler could recover if he showed actual malice which it defined as follows:

> Now having given you as a basis—definition in each of these principles, the word malice—and the Court feels obligated to define that word for you—the Court would indicate that Black's Law Dictionary indicates malice as follows: the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances of the law would imply an evil intent.
>
> In addition thereto, the Court has instructed you that if you determine the defense of qualified privi-

[12]The other evidence of actual malice relied upon by the Court is equally without substance. Thus, the Court emphasizes the "close connection" between News Review staff members and the president of GHI, a large local cooperative housing association, and "the opposition of the News Review to [Bresler's request for] zoning of Parcels 1 and 2 for townhouses, but with no opposition to the construction of townhouses by GHI, itself." (E. 303-4) What the Court fails to point out is that the zoning requested for Parcels 1 and 2 would have resulted in the development of 230 acres at up to 14 units per acre constituting a major departure from the Greenbelt Master Plan whereas GHI proposed to build only 25 townhouses at a density permitted by the Plan (E. 77; Pl. Ex. 2, E. 217-8, Tr. 39).

> lege asserted by the defense applies to this case, that is fair comment privilege, the plaintiff must then prove by a preponderance of the evidence that the defendant published the article complained of with actual malice toward the plaintiff. Therefore, the Court will now again define for you another indication of what malice is. Actual malice involves the state of mind that [sic] the defendant, best described as spite, hostility or deliberate intention to harm. (E. 192-3)

The trial court further instructed that "actual malice" as so defined could be inferred "from the language or circumstances of the publication . . . if the character of the publication is so excessive, intemperate, unreasonable and abusive as to defy any other reasonable conclusion than that the defendant was moved by actual malice toward the plaintiff". (E. 194)

The Court of Appeals held that this definition of actual malice—even though given in connection with the defenses of fair comment and the right to report on a public meeting—could nevertheless properly be considered by the jury on the issue of punitive damages (E. 317).[13] The Court of Appeals further held that the impact of the instructions was later corrected by the following instruction based on incomplete excerpts from *New York Times* and *Rosenblatt v. Baer*,[14] which the trial court thought "seem to disagree" as to the proper definition of actual malice (E. 207-9):

> There is no contention here that the statements regarding blackmail were true.[15] The Constitutional

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[13]After completing its instructions on how the defenses of fair comment and fair report could be overcome by actual malice as he had defined it, the trial court stated: "Now we move on from the principles which we talk about as libel and get to the question of damages. . . ." (E. 194)

[14]376 U.S. 254, 279-80 (1964); 383 U.S. 75, 84 (1966).

[15]This statement clearly undercuts the constitutional instruction by making it appear that petitioners conceded the falsity of the

> guarantee requires a rule that prohibits a public official or public figure from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statements were made with actual malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not. The same thing is said in the same vein, definition of malice is constitutionally insufficient where discussion of public affairs is concerned unless the plaintiff establishes that the utterances were false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. (E. 209)

The trial court specifically refused, however, to instruct that its previous references to actual malice as consisting of "spite, hostility or deliberate intention to harm" were inapplicable under the constitutional standard (E. 208, 210). Moreover, it is clear from the following colloquy with counsel that the trial court intended to instruct the jury that the articles were actionable upon a showing of actual malice as it had previously defined it:

> MR. CLARK: That statement does not make it clear to the jury that under the constitution actual malice is limited to knowledge of the [falsity] or reckless disregard of the truth.
>
> * * *
>
> THE COURT: The Court will not agree with you. . . . I don't think that was the intention. I think there were three elements in other Supreme Court cases on this particular subject, which says with actual malice or knowledge of the statement being false or a reckless disregard for whether it is true or false. And I don't think the Court intended to use those two phrases as a definition of malice. Maybe we will find out from this case which they meant . . . *I am saying actual malice is one thing,*

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articles. The trial court previously instructed that petitioners' failure to specially plead truth as an affirmative defense was a concession that the "allegations [of blackmail] were not true". (E. 190)

knowing that the statement was false is Item 2 and a reckless disregard of whether it is true or false is Item 3. (Emphasis added) (E. 201-2)

Although Bresler admittedly suffered no pecuniary loss and offered no witnesses to show injury to his reputation, judgment was entered on a jury verdict for $5,000 compensatory and $12,500 punitive damages.

SUMMARY OF ARGUMENT

In view of the interest of Greenbelt residents in Bresler's zoning proposal which affected how a substantial portion of the community was to be developed, the News Review was clearly entitled to accurately report the public debate on that proposal at the City Council meetings, including the fact that many participants in the debate characterized the proposal as an attempt to "blackmail" the City.

The lower court completely undermined the protection afforded this report by the *New York Times* rule by extracting the word "blackmail" out of context and ascribing to it a criminal meaning which is wholly foreign to the articles in which it appears. Bresler's proposal to which the word "blackmail" clearly referred was accurately and prominently described in each of the articles in issue. That proposal by its very nature, and the fact that it was publicly made, completely negates the proposition that the articles could be read as charging the crime of blackmail. To hold that a jury could, nevertheless, find not only that the articles charged the crime of blackmail, but also that petitioners should have known this and therefore acted with actual malice, amounts to nothing less than a mockery of the *New York Times* rule.

To base a substantial libel judgment on an accurate report of such clear expressions of opinion on a public issue also contravenes our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v.*

Sullivan, 376 U.S. 254, 270 (1964). The opinions reported are no more intemperate or excessive than those that appear regularly in newspapers throughout the country in connection with hotly contested public issues. At the very least, they should be protected where, as here, the conduct criticized is fully and accurately described in the same article so the reader can draw his own conclusions as to the merit of that conduct and the criticism voiced.

The lower court's additional holding, in connection with the article on Bresler's candidacy for Comptroller, that petitioners' failure to verify further the report that homeowners had started legal proceedings against him constituted evidence of "recklessness sufficient for a finding of actual malice," is equally in conflict with the decisions of this Court. Petitioners had no reason to doubt the accuracy of their report—and therefore to investigate further—since their information came from a number of apparently responsible homeowners who presumably were speaking from first-hand knowledge regarding their complaints against Bresler.

The foregoing are the only holdings of the lower court addressed to the sufficiency of the evidence to meet the constitutional requirement that a defamatory falsehood be published with knowledge of its falsity or with reckless disregard of the truth. The remaining evidence is directed at showing actual malice in the pre-*New York Times* sense of "hostility" and amounts to nothing more than that petitioners, and some of the persons quoted in the articles, had strongly opposed Bresler's land development activities on other occasions.

The fact that this unfounded litigation has proceeded this far with its attendant strain on the limited resources of this small newspaper is itself a serious threat to freedom of the press. To adequately guard against the further chilling effect upon free speech of an extensive retrial of this case, it is respectfully urged that this Court review the evidence and declare that it cannot constitutionally support a judgment for respondent.

Finally, the trial court clearly erred by repeatedly instructing the jury that respondent could recover if he showed actual malice, which was defined as "spite, hostility or deliberate intention to harm" that could be inferred from the publications in issue, and by refusing to instruct on the meaning of reckless disregard of the truth under the *New York Times* standard. In view of the claims made at the trial, these instructions were clearly prejudicial.

ARGUMENT

Introduction

The *New York Times* rule is clearly applicable to the articles in issue. Bresler was not only a member of the Maryland Legislature and later a candidate for the office of Comptroller, but he was also concededly a public figure in Greenbelt as a land developer.[16] Moreover, the articles in issue directly concern "debate about [his] involvement with public issues." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (opinion of Chief Justice Warren).

Thus, the citizenry of Greenbelt clearly had a "legitimate and substantial interest" (*ibid.*) in the public issue raised by Bresler's controversial zoning proposal and in the debate over that proposal at the City Council meetings.[17] They

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[16]Apart from the concession that he was a public figure (E. 19) Bresler had previously received wide, obviously self-induced publicity highlighting the magnitude and importance of his development activities in Greenbelt (Def. Ex. 1, E. 242-3, Tr. 375). Moreover, he clearly thrust himself into the public arena by his repeated and often controversial requests for support from the City Council and other public bodies for his development plans.

[17]The interest of Greenbelt residents in this proposal which directly affected how a substantial portion of their community was to be developed certainly equals the general public interest in college football present in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Moreover, Bresler's "views and actions" with respect to this public issue were "of as much concern to the citizen as the attitudes and behavior of 'public officials' with respect to the same issues and events." *Id.* at 162 (opinion of Chief Justice Warren).

were entitled to a full report of the debate on that proposal at the City Council's meetings, including the fact that many interested persons expressed strong opinions that the proposal was an attempt to "blackmail" the City. These strong expressions not only directly related to the proposal, but their inclusion in the News Review's report was necessary to accurately describe the tone and tenor of the debate.

Likewise, as the articles made clear, the debate was encouraged by City officials to assist them in deciding what to do about the proposal and final action was postponed until the second meeting so they would have an opportunity to consider further reaction to the proposal within the community. The importance of such debate to the proper exercise of governmental power in our society places it at the very core of the *New York Times* protection. As stated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system."

This completely unfounded lawsuit was obviously brought to stifle legitimate criticism of Bresler's disregard of the covenants during his campaign. That it has been permitted to proceed this far, with its attendant strain on the resources of this small newspaper, and has resulted in the substantial judgment affirmed below, clearly imposes "the pall of fear and timidity . . . upon those who would give voice to public criticism [and has created] an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.[18]

Thus, the decision below directly challenges the credibility of the *New York Times* rule as an important safeguard to freedom of the press.

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[18]The $17,500 judgment is a far greater threat to this small newspaper than were the $500,000 judgments in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Associated Press v. Walker*, 388 U.S. 130 (1967).

I

KNOWING FALSITY OR RECKLESSNESS CANNOT BE ESTABLISHED BY EXTRACTING A WORD OUT OF CONTEXT AND ASCRIBING TO IT A MEANING WHOLLY FOREIGN TO THE ARTICLE IN WHICH IT APPEARS.

The Court of Appeals completely undermines the constitutional protection by extracting the word "blackmail" out of context and ascribing to it a criminal meaning wholly foreign to the articles in which it appears. Bresler's zoning proposal to which the word "blackmail" clearly referred is accurately and prominently described in each of the articles in issue before the term "blackmail" appears. Moreover, the headlines of the articles, "School Site Stirs Up Council—Rezoning Deal Offer Debated" and "Council Rejects By 4-1 High School Site Deal," made it clear that the articles were reporting the public debate on that public zoning proposal. Thus, it is inconceivable that any reader of the article who reached the word "blackmail" would not know exactly what conduct by Bresler was being criticized.

The nature of Bresler's proposal—which obviously consisted of a threat on his part to exercise his legal right to resist condemnation of the school site if the city did not support his zoning request—and the fact that the proposal was publicly made completely negate the proposition that the articles could be read as charging the crime of blackmail, which the trial court defined as the "extortion of money by threats or overtures toward criminal prosecution or the destruction of a man's reputation or social standing." (E. 311)

Moreover, both articles report expressions of contrary opinion regarding the proposal which specifically dispute the "blackmail" characterization. In the first article immediately after a housewife's reference to the proposal as "a slight case of blackmail" there is a statement by a member

of the City Council—a leader in the community—which expressed the exact opposite opinion as follows:

> Councilman David Champion, however, denied that it was "blackmail," explaining that he would rather "refer to it (i.e., the negotiations—Ed.) as a two-way street." (Pl. Ex. 1, E. 212, Tr. 39)

The same thing is true in the second article which quotes a speaker from the floor:

> [James Martin] suggested that Bresler's action was not "blackmail" but the legitimate advance of his rights to develop his land. Martin suggested, by way of example, that GHI's long-range planning committee had been doing much the same thing some months ago.[19] (Pl. Ex. 2, E. 218, Tr. 39)

Finally, there was no credible evidence that anyone interpreted the articles as charging Bresler with the crime of blackmail. Bresler was unable to identify a single person who he claimed understood the articles as charging the crime of blackmail. Nor was he able to explain how he himself arrived at that interpretation or why he waited nine months before complaining (E. 114-6). No special damages were claimed.[20]

To hold on the basis of the foregoing that the jury could find that the articles charged Bresler with the commission of the crime of blackmail is to disregard completely the

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[19]This balanced reporting is condemned by the Court of Appeals as indicating "that the original use of the term 'blackmail' was indeed intended and understood to be used in its sense of importing serious criminal conduct on Bresler's part." (E. 301)

[20]"Since give-and-take, sharpness and even coarseness have come to be expected concerning those who entered lists on appeals to the public, and charges are taken with a grain of salt by all concerned, special damages are relevant to show that reputation was injured in that a substantial segment of the community took the publication seriously and in a defamatory sense." *Afro-American Publishing Co. v. Jaffee*, 366 F.2d 649, 661 (D.C. Cir. 1966).

cardinal principle of libel law that words must be construed in the context in which they appear. As stated in 33 Am. Jur., *Libel and Slander*, § 87:

> The intent and meaning of an alleged defamatory statement must be gathered not only from the words singled out as libelous, but from the context; all of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have.

Thus, in *Parker v. Kirkland*, 298 Ill. App. 340, 18 N.E.2d 709 (1939), an attorney claimed that the plaintiff's only purpose in bringing a complaint in an administrative proceeding was "of blackmailing" the attorney's client. In affirming dismissal of the complaint, the Court stated:

> [T]he record shows that Kirkland defined what he meant by "blackmailer" and "blackmail"; he was characterizing what he said was Parker's admitted conduct. . . . [A] person may at the time of speaking words which are, in their ordinary signification, slanderous by imputing crime, so qualify them by other words as to show that he uses them in a different sense and that all the words spoken at one time must be taken together, and although one part when detached from another may be slanderous, yet if taken all together, they may not be so. . . . 18 N.E.2d at 718.

See also *Bennett v. Seimiller*, 175 Kan. 764, 267 P.2d 926, 929-30 (1954) and *Flanagan v. Nicholson Publishing Co.*, 137 La. 588, 68 So. 964, 966-67 (1915), both of which involved dismissal of actions challenging the use of the term "traitor."

For the Court of Appeals to make the further finding, premised upon this complete disregard of the context of the articles, that petitioners should have known they were charging the crime of blackmail, and therefore published that charge with knowledge of its falsity, is nothing less than a mockery of *New York Times*. Knowing falsity or

recklessness must be shown by proof possessing "the convincing clarity which the constitutional standard demands." *New York Times Co. v. Sullivan,* 376 U.S. at 285-6. The uncontradicted evidence is that it did not occur to anyone on the News Review that the word "blackmail" might be understood in the criminal sense in the context in which it was used. This testimony was amply corroborated by Bresler's inability to identify anyone who understood the articles as charging a crime or to explain how he himself arrived at that interpretation.[21]

Thus, not only is there no evidence of knowing falsity or recklessness, but the lower court's total disregard for the context of the articles is a dangerous precedent which, if allowed to stand, could seriously undermine constitutional protection of much of the strong or colorful expression commonly associated with "uninhibited, robust, and wide-open" public debate. *New York Times Co. v. Sullivan,* 376 U.S. at 270.

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[21]The Court of Appeals clearly does not answer the complete absence of proof of knowing falsity by saying that the intended meaning and therefore the "truth" of the word "blackmail" as used in the articles is a jury question (E. 290). As stated by Justice Harlan in *Time, Inc. v. Hill,* 385 U.S. 374, 406 (1967) (separate opinion):

> [I]n many areas which are at the center of public debate "truth" is not a readily identifiable concept, and putting to the pre-existing prejudices of a jury the determination of what is "true" may effectively institute a system of censorship. Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity.

II

CLEAR EXPRESSIONS OF OPINION REGARDING AN ACCURATELY DESCRIBED PUBLIC PROPOSAL SHOULD NOT BE ACTIONABLE.

To base a substantial libel judgment on an accurate report of such clear expressions of opinion regarding a public proposal that is fully and accurately described itself contravenes our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. at 270. This Court has repeatedly recognized that public debate frequently entails sharply stated views, the expression of which must be protected if the debate itself is to be encouraged. *Garrison v. Louisiana*, 379 U.S. 64 (1964) (implication that judges were under "racketeer influences"); *Henry v. Collins*, 380 U.S. 356 (1965) (law enforcement officials accused of making arrest as part of "diabolical plot"); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967) (court clerk accused of "threats" to "intimidate" another official). As stated in *New York Times:*

> "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," . . . and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." [Citations omitted] 376 U.S. at 269.

The equal importance of protecting such uninhibited debate with respect to public issues involving "public figures" as well as "public officials" was underscored by Chief Justice Warren in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967), as follows:

> Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials." The

> fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

The "blackmail" opinions reported are no more intemperate or excessive than those that appear regularly in newspapers throughout the country in connection with hotly contested public issues. To cite some of the recent examples from major newspapers, which are collected in Appendix A to this brief, the word "blackmail" has been used to describe Representative Natcher's refusal to authorize subway funds without highway construction in the District of Columbia (The Washington Post, July 22, 1969 and The Evening Star, July 22, and August 5, 1969); a religious leader's statement that Conservative Jews who support Israel have a right to influence its religious policies (New York Times, October 27, 1968); Representative Wilbur Mills' attempt to condition a tax increase on a reduction in government spending (The Baltimore Sun, May 4, 1968); a civil rights leader's statement that Negroes should control businesses in the ghetto (The Evening Star, May 2, 1968); and Senator Fulbright's effort to force a change in Vietnam policy by delaying passage of legislation desired by the Administration (The Washington Post, February 29, 1968).

These and other colorful expressions of opinion are the essence of spirited debate. At the very least, they must be fully protected where, as here, the conduct being criticized is fully and accurately described in the same article so that the reader can draw his own conclusions as to the merit of that conduct and the criticism voiced.

Whatever may be the impact of the constitutional protection where it is difficult to differentiate opinion from fact or where the opinion expressed implies other defama-

tory facts,[22] the *New York Times* rule must be dispositive in the instant case. A clear expression of opinion, however strong, which cannot reasonably be interpreted to imply the existence of facts other than those fully and accurately described in the same article, simply does not rise to status of defamatory falsehood which is a *sine qua non* for liability under *New York Times.*

The dispositive importance in the pre-*New York Times* cases of identifying and accurately describing the conduct being criticized is made clear in *Pulvermann v. A. S. Abell Co.*, 131 F.Supp. 617 (D. Maryland 1955), *aff'd*, 228 F.2d 797 (4th Cir. 1956), which involved far stronger expressions of opinion than the instant case. In that case, an official of the Democratic National Committee had been discharged because he and another had been instrumental in obtaining a government contract whereby they were to receive a 5% commission. In reporting this, The Baltimore Sun repeated a statement by another newspaper terming the case "the biggest five percenter deal ever exposed in Washington" and a statement by General Eisenhower, who was then a candidate for President, referring to it as the "sort of crookedness that goes on and on in Washington." In affirming summary judgment for the defendant, the court stated:

> The only portions of the article of which plaintiffs can complain as not being statements of fact is that portion relating to the Herald-Tribune's terming the case "the biggest five percenter deal ever exposed in Washington" and General Eisenhower's referring to it as the "sort of crookedness that goes on and on in Washington". These, however, cannot be deemed unfair comment when read, as they must be, in connection with the remainder of the article, which sets forth in detail the facts to which the comments relate and carries the statement of Westbrook with regard thereto including his denial

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[22] See Prosser, THE LAW OF TORTS at 814 (3rd ed. 1964); RESTATEMENT OF TORTS, § 606, Comment *b* (1938).

> that he had used or attempted to use his position to influence the awarding of the contract or that his services were of the "so-called 'five percenter' variety." 228 F.2d at 802.

Certainly, no less protection for expressions of opinion on public issues should be afforded under the *New York Times* rule.

III

FAILURE TO VERIFY INFORMATION OBTAINED FROM A NUMBER OF APPARENTLY RELIABLE SOURCES DOES NOT CONSTITUTE RECKLESS DISREGARD OF THE TRUTH.

With respect to the article on Bresler's candidacy for Comptroller, the holding by the Court of Appeals that petitioners' failure to verify further their report that homeowners had started legal proceedings amounted to evidence of "recklessness sufficient for a finding of actual malice" (E. 303) is equally in conflict with the decisions of this Court. In *New York Times* this Court held that the Times' failure to check its own files "supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." 376 U.S. at 287-8. See also *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967).

In *St. Amant v. Thompson*, 390 U.S. 727 (1968), the defendant in a television speech charged a deputy sheriff with accepting money from a corrupt union official based upon an unverified affidavit from another union member which subsequently proved to be false. In reversing a judgment for the deputy sheriff, this Court stated:

> These cases are clear that reckless conduct is not measured by whether a reasonably prudent man

> would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. 390 U.S. at 731.

The complete lack of any evidence that petitioners in fact doubted—or even should have doubted—the accuracy of the article is clearly exposed in the Court of Appeals' feeble attempt to distinguish *New York Times* (E. 302-3). Thus, the fact that petitioners called Bresler on two earlier occasions pursuant to a News Review policy of verifying doubtful facts hardly established that they in fact entertained doubts on this occasion because they didn't call him. If anything, their failure to call on this occasion indicates that petitioners did not doubt the accuracy of their information regarding the homeowners' proceedings. Nor was there any reason for them to do so since their information came from a number of apparently responsible homeowners who presumably were speaking from first-hand knowledge regarding their complaints against Bresler.

The only other premise for the Court of Appeals' holding that the failure to check court records or call Bresler was sufficient evidence of recklessness was its conclusion that Mrs. Skolnik was a knowledgeable, experienced reporter who "must have known that the report of the actual institution of suits against a builder and developer 'for failure to make construction corrections in accordance with county standards' was calculated to result in serious injury to Bresler's standing as a builder and developer . . ." (E. 302)[23]

In this regard, it should be noted that Bresler's claim of falsity in the use of the term "started legal proceedings" is relatively narrow and technical. He did not dispute the fact

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[23] Bresler made no attempt to show that the article actually hurt his business.

that a large number of apparently responsible homeowners had complained to him or that they had told Mrs. Skolnik they had gone to their lawyers to start action and had complained to public officials that he had failed to make corrections in their homes in accordance with county standards. It is difficult to see a material difference, in terms of its impact on Bresler's reputation, between a statement of these facts and the statement actually published which was that a number of homeowners had "started legal proceedings."[24] Even if it is assumed, as the court holds, that the layman should equate starting legal proceedings with the actual filing of suits, this would mean no more than that the homeowners had repeated their complaints in court, which, in fact, at least one owner had done (and three did thereafter) by filing suit against corporations in which Bresler was an active principal.

Assuming, *arguendo*, that the error claimed seriously threatened Bresler's reputation, the reasoning of the Court of Appeals would mean that any time a serious charge is made, that fact alone would be sufficient to require that the publisher further investigate regardless of the number and apparent reliability of his sources. That this is clearly not the import of the *New York Times* rule is apparent not only from *New York Times* and *St. Amant* but also from *Garrison v. Louisiana*, 379 U.S. 64 (1964), all of which involved far more serious charges. In *Garrison*, the Court stated as follows:

> [T]he trial court also rested the conviction on additional findings that the statement was false and not made in the reasonable belief of its truth. The judge said:
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> 'It is inconceivable to me that the Defendant could have had a reasonable belief, which could be defined

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[24] This difference, unlike the charge that Wally Butts illegally fixed a football game, is hardly one "whose substance makes substantial danger to reputation apparent." *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). As noted *supra*, p. 10, n.7, the trial court wasn't bothered by this article.

as an honest belief, that not one but all eight of these Judges of the Criminal District Court were guilty of what he charged them with in the defamatory statement [inefficiency, laziness, hampering law enforcement and being under "racketeer influence"]. These men have been honored . . . with very high offices . . . . It is inconceivable to me that all of them could have been guilty of all of the accusations made against them. Therefore, I do not believe that the qualified privilege . . . is applicable . . .'

This is not a holding applying the New York Times test. The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard. According to the trial court's opinion, a reasonable belief is one which "an ordinarily prudent man *might be able to assign a* just and fair reason for"; the suggestion is that under this test the immunity from criminal responsibility in the absence of ill-will disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth. 379 U.S. at 78-79.

IV

THIS COURT SHOULD HOLD THAT THERE IS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO PERMIT RECOVERY UNDER THE *NEW YORK TIMES* RULE.

Although Bresler was given extremely wide latitude to develop all of the facts and circumstances attending the publication in issue he clearly failed to present evidence which is sufficient as a matter of law to establish that petitioners published a defamatory falsehood about him "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. at 279-280.

The only holdings of the Court of Appeals addressed to the sufficiency of the evidence to meet this standard of actual malice are with respect to the articles in which the word "blackmail" appears and the article regarding Bresler's candidacy for Comptroller. For the reasons set forth in Points I-III, *supra*, the evidence in this regard clearly "lacks the convincing clarity which the constitutional standard demands." *Id.* at 285-6.

The constitutional protection, however, will not be served if this Court merely reverses on the basis of the clearly erroneous findings with respect to these articles or because of the trial court's equally erroneous instructions on actual malice, *infra*, pp. 34-7. As noted *supra*, p. 20, the fact that this unfounded litigation has proceeded this far, with its attendant strain on the limited resources of this small newspaper, has created "an atmosphere in which the First Amendment freedoms cannot survive." *New York Times Co. v. Sullivan*, 376 U.S. at 278 (1964).

To adequately guard against the further chilling effect upon free speech of an extensive retrial of this case, it is respectfully urged that this Court "review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent." 376 U.S. at 284-5; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 139, 156-9 (1967) (opinion of Mr. Justice Harlan); *Id.* at 168-170 (opinion of Chief Justice Warren); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Pickering v. Board of Education*, 391 U.S. 563 (1968). See also, *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969), *cert. denied*, 395 U.S. 922.

Bresler did not seriously contend that any of the other publications in issue contained defamatory falsehoods which were made with knowledge of their falsity or with reckless disregard of the truth. On the contrary, substantially all of his voluminous evidence was directed toward showing that the News Review staff, and many members of the community, were generally "hostile" to him since they opposed his land development activities.

Regardless of how this evidence of opposition to Bresler's involvement in public issues is characterized, it is clearly insufficient to nullify the constitutional protection in the absence of "convincing evidence" that a defamatory falsehood was published with knowledge of its falsity or with recklessness. The rationale for excluding concepts of "spite, hostility or deliberate intention to harm" from the definition of "actual malice" under the *New York Times* rule was succinctly stated in *Garrison v. Louisiana, supra,* as follows:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. 379 U.S. at 73.
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> * * *
>
> [O]nly those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government. *Id.* at 75-76.

See also, *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967); *Pauling v. Globe-Democrat Publishing Co.,* 362 F.2d 188 (8th Cir. 1966), *cert. denied,* 388 U.S. 909 (1967). In *Pauling,* which involved a false factual charge in an editorial that a well-known chemist had been cited for contempt by a Congressional committee, the court stated:

> The claimed proof of malice consisted of the defendant's publication in its newspaper of letters to the editor, a cartoon, and a series of adverse editorial comments on Dr. Pauling both before and after the editorial of October 10; . . .
>
> Our conclusion is that these factors of asserted proof add up to something far less than the definition of actual malice prescribed for the *New York Times* exception and fall short of "the convincing clarity which the constitutional standard demands."

> Pp. 285-286 of 376 U.S., p. 729 at 84 S. Ct. Singly or in the aggregate, these factors might possibly be found to constitute reportorial negligence or antagonism or contempt for Dr. Pauling and his views and methods. Yet, each and all of these have been held to be less than "actual malice". 362 F.2d at 198.

Here, the complete lack of substance to the evidence relied upon by the court to show "personal animus" and "affirmative hostility," which as shown *supra*, pp. 10-14, relates primarily to conduct of the defendant far removed from and unrelated to the publications relied on, further demonstrates the wisdom of precluding recovery under the *New York Times* rule based on evidence purporting to show mere "hostility."

Thus, it is clear that the evidence relied upon, which was fully developed below, is constitutionally insufficient to support a judgment for Bresler.

V

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS:

(A) By repeatedly instructing that recovery could be based upon "actual malice" which was defined as "spite, hostility or deliberate intention to harm" that could be inferred from the publications themselves.

The trial court clearly erred by its repeated instructions that Bresler could recover if he showed "actual malice" which was defined—in connection with the particularly germane defenses of fair comment and right to report public meetings—as "spite, hostility or deliberate intention to harm."

In *Rosenblatt v. Baer*, 383 U.S. 75, 84, the Court stated that almost identical instructions were "constitutionally insufficient" as follows:

> The trial court also charged that "[d]efamatory matter which constitutes comment rather than fact

> is justified if made without malice and represented fair comment on matters of public interest," and defined malice to include "ill will, evil motive, intention to injure . . . ." This definition of malice is constitutionally insufficient where discussion of public affairs is concerned; "[w]e held in *New York Times* that a public official might be allowed the civil remedy *only* if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true." (Emphasis added)

In *Beckley Newspapers Corp. v. Hanks, supra,* 389 U.S. at 81, 82, the Court stated that such instructions were "clearly impermissible" as follows:

> Although this action was tried subsequent to the decisions of this Court in [*New York Times; Garrison; Henry v. Collins, and Rosenblatt v. Baer*], and despite the fact that it was recognized at trial that the principles of *New York Times* were applicable, the case went to the jury on instructions which were clearly impermissible. The jury was instructed in part that it could find for the respondent if it were shown that petitioner had published the editorials "with bad or corrupt motive," or "from personal spite, ill will or desire to injure plaintiff."

With respect to the trial court's further instruction that actual malice as so defined could be inferred from the "language" of the publication, the Court in *Henry v. Collins,* 380 U.S. 356 (1965), summarily reversed on the *certiorari* papers a judgment based upon an instruction allowing the jury to "infer malice . . . from the falsity and libelous nature of the statement," pointing out this instruction allowed the jury to find malice from "intent to inflict harm" rather than from "intent to inflict harm through falsehood." 380 U.S. at 357.

In view of the emphasis given to these erroneous instructions, the perfunctory and confusing instruction given by the trial court on the *New York Times* rule at the conclusion

of its instructions clearly was not sufficient to correct the improper definition of actual malice that had been conveyed. The *New York Times* instruction was clearly undercut when the trial court again erroneously referred to petitioners' failure to specially plead truth as a concession that they had falsely charged Bresler with the crime of blackmail. Moreover, the trial court specifically refused to instruct that its previous references to "actual malice" as consisting of "spite, hostility or deliberate intention to harm" were inapplicable under the constitutional standard (E. 199-202, 207-10). That the trial court intended to still convey to the jury the impression that evidence of actual malice, as it had previously been defined, was sufficient to permit recovery is made clear in the colloquy with counsel, *supra*, pp. 16-7, where the trial court stated its understanding of the law that "actual malice is one thing, knowing that the statement was false is Item 2 and a reckless disregard of whether it is true or false is Item 3." (E. 201-02)

Inasmuch as substantially all of Bresler's evidence was directed at showing hostility, these instructions were clearly prejudicial. If the *New York Times* rule is to provide meaningful protection in a jury case, the constitutional standards of proof must be made abundantly clear in the instructions to the jury. Since the constitutional protection was clearly and concededly applicable, the trial court should have given only the constitutional definition of actual malice in its instructions directed to whether or not the articles were actionable, as was requested by petitioners. Certainly, it should not be assumed as the Court of Appeals so casually did below, that the jury understood the instructions on this critical point differently from the trial court which gave them (E. 318). See *Time, Inc. v. Hill*, 385 U.S. 374, 396 (1967).

(B) By refusing to instruct on the meaning of reckless disregard of the truth.

In view of Bresler's claim of recklessness in connection with petitioners' failure to further verify their statement, in the article on Bresler's candidacy for Comptroller, that homeowners had started legal proceedings against him, the trial court similarly erred in refusing to instruct that reckless disregard of the truth under the constitutional standard means "more than mere negligence" and requires "a high degree of awareness of . . . probable falsity." This instruction was clearly necessary to convey to the jury the important subtleties inherent in the constitutional standard of recklessness as defined in *Garrison v. Louisiana, supra,* 379 U.S. at 74, and the other decisions of this Court cited in Point III, *supra,* pp. 28-31.

CONCLUSION

For each of the foregoing reasons, petitioners ask this Court to reverse the judgment of the Maryland courts; to vacate the $17,500 award; to direct that the declaration therein be dismissed with prejudice and to award costs to petitioners.

Respectfully submitted,

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December 4, 1969

APPENDIX A

The Washington Post

TUESDAY, JULY 22, 1969

Phillips Hits 'Blackmail' In Metro Plan

By Richard Prince
Washington Post Staff Writer

Washington Democratic leadership yesterday told the City Council it should temporarily give up the long-sought-after subway rather than submit to building the controversial Three Sisters Bridge.

The building of the Potomac River span is part of the price being asked by Rep. William H. Natcher (D-Ky.) head of the House Appropriations subcommittee on the District, in order to release subway money.

* * *

Democratic National Committeeman Channing E. Phillips, who said he was speaking for the local Democratic leadership and "the city's Democratic majority," said yesterday Natcher's position amounted to "blackmail" and called upon the city government to "stand up like men against our colonial master."

If the subway must be sacrificed for the time being, he said, that is "the price of freedom" that "has always been high."

"It is being said that the subway is more important than the Three Sisters Bridge," Mr. Phillips told a press conference. "But everyone knows that blackmailers, when successful, almost always demand more and more. If the Three Sisters Bridge can be obtained for this year's subway appropriations, the North Central Freeway can be forced on the community by withholding next year's subway funds. This same method can then be used to force other programs on the District government.

"If Congressman Natcher is to run the District government, let him do it directly and openly. There is no need for the City Council to do his dirty work for him."

* * * *

The Evening Star
Washington, D. C., Tuesday, July 22, 1969

D.C. Council Calls Off Subway-Roads Session

By STEPHEN GREEN
and WILLIAM BASHAM
Star Staff Writers

The District City Council today abruptly called off a meeting scheduled for this morning to resolve Washington's subway-freeway impasse.

In closed session yesterday the council had agreed to approve construction of the Three Sisters Bridge in return for congressional release of subway construction funds.

However, several council members decided overnight that they need a guarantee that the House of Representatives would, in fact, release the $18.7 million subway construction money if the council should take the politically sensitive step of approving the bridge.

* * *

Several council members asked Chairman Gilbert Hahn Jr. to visit Rep. William Natcher, D-Ky., to obtain a guarantee that he will agree to release of the subway funds, if the council okays the bridge. However, Hahn reportedly is reluctant to undertake the visit since he is a Republican and Natcher, who has been the key figure in holding up subway funds, is a Democrat.

* * *

Led by Natcher, the House has refused to appropriate $18.7 million, in subway construction funds until the city agrees "beyond recall" to build the Three Sisters Bridge and other segments of the interstate road system that Congress ordered built in the 1968 Highway Act. The Senate has approved the appropriation.

Freeway foes contend the roads and bridge will bring unnecessary traffic to the city, damage its vitality and destroy needed housing.

The Rev. Channing E. Phillips, District Democratic national committeeman, reiterated his opposition to the Three Sisters Bridge yesterday and Bruce Terris, chairman of the District Democratic Central Committee, said Phillips was speaking for the committee.

Phillips charged that Natcher and Congress are attempting to "blackmail" the city. "I believe the freeways should not be built because they are bad for the city. But this is not the issue . . . the issue is whether the city government will bow now to congressional threats. While the subway . . . is important, the price of freedom has always been high," he said.

The Evening Star

WASHINGTON, D. C., TUESDAY, AUGUST 5, 1969

Mrs. Spellman Asks Delay Of Subway Planning Funds

By THOMAS LOVE
Star Staff Writers

The chairman of the Washington Suburban Transit Commission is recommending that no more money be spent on planning the area subway system until the present impasse over freeways is solved.

Chairman Gladys Noon Spellman said today that she will make her recommendation to the authority at its meeting Thursday.

Congress has refused to appropriate the District's portion of subway construction costs. Rep. William H. Natcher, D-Ky., says he will continue to withhold all money until bridge and freeway projects are under way.

The District government, however has refused to start work on the controversial portions of the freeway system.

Until the federal funds are voted, construction on the Metro system cannot begin.

Capitol Rally

The freeway issue was raised in the District today as about 70 Washington area residents rallied on the steps of the Capitol to protest the proposed ABM. The speakers, however, used the forum to attack the freeways, the District's lack of home rule and Mayor Walter E. Washington.

School board member Julius Hobson accused Mayor Washington of having no "guts or backbone for not helping the protesters block the ABM proposal.

Hobson also shouted at the crowd about "an idiot named Natcher" who has tried to "blackmail" the city to build freeways.

Hobson said the city is overwhelmingly against the freeway. He said the nation is 80 percent against the ABM system, on which the Senate will vote tomorrow.

NEW YORK TIMES - October 27, 1968

'BLACKMAIL' LAID TO 2 JEWISH UNITS

Orthodox Rabbi Scores Plan on Religion in Israel

A leader of Orthodox Judaism charged the major Conservative and Reform rabbinic groups in this country with "attempted blackmail" yesterday in what he described as their efforts to "foist" upon Israel "unwelcome religious practices and philosophies."

The Orthodox leader, Rabbi Zev Segal, the president of the Rabbinical Council of America, referred to a joint agreement reached last Wednesday by 60 Conservative and Reform leaders to cooperate in developing a "liberal religious alternative" to Orthodox Judaism in Israel.

For years, the Central Conference of American Rabbis (Reform) and the Rabbinical Assembly (Conservative) have been endeavoring to strengthen their influence in Israel. But under Israeli law the right to perform marriages and exercise other religious functions is reserved for Orthodox rabbis.

First Joint Meeting

Participants in Wednesday's meeting included Rabbi Ralph Simon, the president of the Rabbinical Assembly, and Rabbi Levi A. Olan, the president of the Central Conference. It was the first joint session of the leaders of the two groups.

In his statement yesterday, Rabbi Segal was particularly critical of a comment made at the meeting by Rabbi David Polish, spiritual leader of the Beth Emet Free Synagogue in Evanston, Ill.

Emphasizing the need for continuing identification with Israel, Rabbi Polish told the Conservative and Reform leaders that "so far we have manifested this identity not only financially but by bringing influence to bear on Israel's economic policies."

"We have no less a right and a claim to influencing, for a time, its religious policies," Rabbi Polish said.

To this, Rabbi Segal replied: "By implying that the financial support of the Reform and Conservative movements in the United States of Israel's needs is conditioned upon Israel's acceptance of their religious ideologies, the leaders of the Reform and Conservative movements are engaging in a form of attempted blackmail that is repugnant to all for whom the ideal of religious freedom is precious."

* * * *

THE BALTIMORE SUN

BALTIMORE, SATURDAY, MAY 4, 1968

'BLACKMAIL' TERM USED ON TAX SNAG

Johnson Calls Bill Top U.S. Need Behind Peace Solution

By RODNEY CROWTHER
(Washington Bureau of The Sun)

Washington, May 3—In blunt language, President Johnson today virtually accused the House Ways and Means chairman, Representative Mills (D., Ark.) of trying to "blackmail" the Administration into yielding on reduction of Government spending before he will move a tax bill.

Mr. Johnson said what needs to be done more than anything else—except to try to find a peace solution—is to "pass a tax bill without any 'ands,' 'buts' or 'ors.'"

"If they want to effect reductions," he said of Congress, "then as each appropriation bill comes along, they can offer their amendments like men out on the floor and call the roll.

"But don't hold up a tax bill until you can blackmail someone into getting your own personal viewpoint over on reductions."

Cut Called Inadequate

Chairman Mills yesterday indicated that he feels the $4,000,000,000 spending cut proposed by the House Appropriations Committee is inadequate, and that a program must be prepared which will reduce the Federal deficit from $25,000,000,000 to below $10,000,000,000.

President Johnson told his news conference today that to accede even to the $6,000,000,000 spending cut the Senate voted in connection with the 10 per cent surtax "would really bring chaos to the Government."

Anything beyond a $4,000,000,000 cut in spending, he said, would either be "a phony paper cut" or would seriously damage vital Government activities.

The Evening Star

THURSDAY, MAY 2, 1968

Letters to the Editor

Black Business

* * * *

SIR: Marion Barry has announced that if the people whose businesses were burned out want to come back they are going to have to give 51 percent control to Negroes or else be burned out again.

The answer to this sort of blackmail should be plain. The white merchants should collect their insurance and leave the ghetto. Let the debris remain. Leave the blackmailers without shops and other conveniences provided in the past. To comply with Barry's threat is to take a step toward establishing the kind of country that cannot endure. Government by blackmail is unendurable.

Emett Harris.

The Washington Post
THURSDAY, FEBRUARY 29, 1968

Debasing the Debate

The tone and temper of the Vietnam debate is getting uglier at just the moment when the need is greatest for a national display of unity and resolve. It is one thing for Sen. Fulbright and the war critics on his Foreign Relations Committee to challenge the President's Vietnam policy and call for a review. It is nothing less than blackmail to make "the prospect of negotiation" with an apparently intransigent enemy the price for passage of appropriations for the Asian Development Bank "and a lot of other bills."

In the first place, the idea of robbing the Asian Bank to pay off an old score with the President makes no sense unless the Senators who advocate it are prepared to introduce a measure to repeal the Tonkin Resolution and advocate this country's withdrawal from the Asian scene. The Asian Development Bank—and the concern for economic development it carries with it—is the single most important non-military contribution this country has made to the betterment of Asian life and the promotion of political stability of the area in many years. To deny it the $200 million in special funds it so urgently needs to operate effectively is to create the very impression the war critics would presumably like to avoid—that the United States has nothing much to offer Asians in their search for security save shot and shell.

Before anything else is done, the Foreign Relations Committee members should take the advice of one of their most distinguished and statesmanlike colleagues, Sen. Cooper, and forswear this kind of senseless pressure tactics in a time of serious crisis. That much said, it needs to be added that it took a great deal of deep-seated bitterness to produce so crude a power play—and this bitterness, justified or not, is a fact of political life that is not going to be washed away by the kind of appeal for unity the President made in Dallas the other day.

The New York Times

THURSDAY, FEBRUARY 8, 1968

The Mayor Acts

Mayor Lindsay's ultimatum to the striking sanitationmen who have held the city in bondage since last Friday is precisely the action required to save the city from disaster. With New York buried in garbage and a major snowstorm impending, it would have been suicidal to wait—and wait—and wait for the union to end its illegal strike.

The Mayor will have overwhelming public support in his declaration that the city cannot submit to "blackmail" by any group of unionized civil service workers, perverting its control over a vital public service into an instrument of extortion. Collective bargaining cannot go forward while the city is being held for ransom as surely as if it had been captured by a band of pirates.

SUNDAY, FEBRUARY 11, 1968

Break in the Siege

The immediate reaction of all New Yorkers to the end of the criminal sanitation strike must be one of overwhelming relief that the mountains of filth will be removed from the streets before the city is devastated by disease and fire. But the arrangement under which Governor Rockefeller has bought the return to work is as bizarre as anything that has happened in all the nine days of nightmare since this strangest of civil service tie-ups began.

Mayor Lindsay has properly stood fast in his refusal to pay "blackmail" to the sanitation union while its members were off their jobs in defiance of law, court order and civic responsibility. The Governor has given a host of rationalizations for his refusal to call out the National Guard. Undoubtedly the two that were controlling were politics and the threat of a general strike held over the city by the Central Labor Council.

THE EVENING STAR
Washington, D. C., Friday, February 9, 1968

Lindsay Blasts Panel's Plan To End Strike

NEW YORK (AP) — Mayor John V. Lindsay rejected early today the recommendations of Gov. Nelson A. Rockefeller's special panel for ending the 8-day-old sanitation men's strike.

Hours later Rockefeller turned dow down Lindsay's renewed call for National Guard help in removing the tones of festering garbage.

The striking sanitation union had agreed to the special panel's offer of a $425 annual pay increase, only $25 above a state mediator's proposal made before the strike. The city had also rejected the $400 settlement offer.

'Very Hopeful'

Asked if he thought the Guard would be called out, Rockefeller replied: "No, I honestly don't."

The governor said he was "very hopeful" that Lindsay would change his mind about the formula offered by the special mediators.

Shop stewards for the strikers voted unanimously to accept the recommended settlement, which would have raised their pay $425 a year retroactive to July 1.

The Washington Post
FEB 8 — 1968

Lindsay Bids Garbagemen Return

NEW YORK, Feb. 7 (UPI) —Mayor John V. Lindsay, warning that New York City "will not pay blackmail," tonight told striking sanitation workers that if they do not return to work by 7 a.m. Thursday he will seek state help to remove tons of garbage from streets and sidewalks.

* * *

In one of his strongest statements yet, Lindsay noted that the central issue of this strike is whether New York can be "blackjacked into awarding exorbitant contract demands to a union simply because that union is willing to break the law.

"The city will not submit," he said. "It will not pay blackmail."

At a predawn news conference Lindsay declared: "I said yesterday the city would not pay blackmail in order to conclude this strike. The proposed settlement, in my view, asks the city to pay a little blackmail."

THE EVENING STAR A-21
Washington, D. C.
Thursday, May 29, 1969

Social Welfare Parley's Moves Please Militant

By BETTY JAMES
Star Staff Writer

NEW YORK — The beleaguered National Conference on Social Welfare moved to its close today on a first note of harmony.

Dr. George A. Wiley, executive director of the National Welfare Rights Organization — which has twice disrupted the confernece since it began Sunday night — told a press conference yesterday he was "very satisfied" with the way the conference had responded to his group's demands.

But many of the conference's estimated 7,000 delegates disagreed, openly calling the welfare rights group's tactics on Sunday night "blackmail." At the opening session, members of the rigst organization formed human chains around the doors of the New York Hilton Hotel ballroom, refusing to let delegates leave until they had contributed to the organization.

Later, the conference voted to raise $35,000 to allow at least 250 poor people to attend next year's conference, an action still to be ratified by mail ballot.

The Philadelphia Welfare Rights Organization yesterday blasted that decision, saying, "Robbery for whatever reason will never solve the basic problems of poverty."

The statement declared, "The Philadelphia Welfare Rights Organization was not part of and does not condone the tactics and 'supposed' militant action on the part of the National Welfare Rights Organization's staff and some of its members . . . Society is already too violent."

Wiley, though conceding the Philadelphia chapter was "entitled to their opinion," disagreed that the Sunday tactics constituted "robbery." Many people at the conference had stopped him in the last few days to praise the "honest dialogue" that resulted after the opening session, he said.

In a separate action, the conference created a committee to raise funds for the welfare rights group. About $2,000 has been raised so far. In addition, delegates themselves have contributed about $4,000 to the rights organization, which has set up solicitation booths near the registration desk.

The Philadelphia chapter also attacked the national organization for accepting a $434,930 grant from the U.S. Labor Department to help implement the Work-Incentive Program for Relief Recipients (WIN), which the Philadelphia group said is designed to remove mothers from the home and place them in "slave labor" jobs.

WASHINGTON POST, February 28, 1968, page D7

Wire Services Block New Paper, Chalk Says

By George Lardner Jr.
Washington Post Staff Writer

Financier C. Roy Chalk protested in absentia to the Senate Antitrust Subcommittee yesterday that the Nation's big wire services were unfairly blocking his attempts to start a daily newspaper here.

The editor of Chalk's weekly Washington, D.C., Examiner, Jack Limpert, told the Subcommittee that United Press International had initially demanded what amounted to a "blackmail payment" to keep it from entering the daily newspaper field.

"We are thus at the mercy of our competitors, who set the rules of the game," Chalk reported to the Subcommittee.

Chalk himself was in Central America yesterday and Limpert presented the financier's prepared statement.

Both UPI and the Associated Press, Chalk complained, refuse to supply their news services to papers without a substantial paid circulation.

Most of the Examiner's 200,000 copies a week are distributed free from racks on Chalk's D.C. Transit and W. V. & M. Coach Co. buses. Chalk said this was the only way—short of a "huge, go-for-broke investment the first year"—that Examiner could build up advertising and readership.

The Audit Bureau of Circulation, the Subcommittee was told, has similar restrictions. Most advertisers, Chalk said, require ABC audits as proof of circulation, but ABC, a newspaper-supported cooperative, won't make the audits for publications with a paid circulation of less than 50 per cent.

The system, he said, protects Washington's three dailies, The Washington Post, the Evening Star and the Daily News, and effectively stifles competing new voices.

"It may take us five years to build up to 100,000 paid circulation," Chalk said in his statement.

UPI said it would save its reply for a March 5 hearing before the Subcommittee. Reached in New York, UPI General Sales Manager Wayne Sargent said he would prefer to read in full what Limpert, a former UPI regional executive, and Chalk had said.